(1)

92-772
No.

Supreme Court, U.S.
FILED
SEP 29 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID YOUNG,

Petitioner,

against

STATE UNIVERSITY OF NEW YORK, HEALTH SCIENCE CENTER AT BROOKLYN, UNIVERSITY HOSPITAL and PAUL ROSENFELD, Acting Executive Director of University Hospital and UNITED UNIVERSITY PROFESSIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petition for a Writ of Certiorari

ARTHUR H. GRAE
Attorney for Petitioner
5 Saunders Street
Hastings on Hudson, NY 10706
(914) 478-5000

QUESTIONS PRESENTED

Whether it violates the decisions of this Court for a State Court to substitute its own opinion as to penalty for those of an Arbitrator in a contractual disciplinary arbitration between a public employer and an employee on public policy grounds held pursuant to a union collective bargaining agreement?

Whether the substitution of the opinion of a State Court for that of an Arbitrator in a disciplinary arbitration proceeding between a public employer and an employee on the ground that the award violates public policy is contrary to the Equal Protection and due process Clause (Fourteenth Amendment, U.S. Constitution)?

PARTIES

All of the parties to the proceeding in the New York State Court of Appeals were the Petitioner, David Young and the Respondents State University of New York, Health Science Center At Brooklyn, University Hospital, Paul Rosenfeld and United University Professions.

Table of Contents.

QUESTIONS PRESENTED i
PARTIES ii
Opinions Below 1
JURISDICTION 3
STATUTORY PROVISION 4
STATEMENT OF THE CASE 6
APPENDIX A 1
Opinion of the New York State Court of Appeals, decided July 1, 1992 1
APPENDIX A-1 2
ORDER OF NEW YORK STATE COURT OF APPEALS, DATED AND ENTERED ON JULY 1, 1992. 2
APPENDIX B 4
Opinion of Arbitrator Jonas Aarons (On Remand), dated March 23, 1992 4
APPENDIX C 19
Opinion of the New York State Court of Appeals, dated September 12, 1991 19
APPENDIX D 20
Opinion of the New York State Court of Appeals, dated June 4, 1991 20
APPENDIX E 21
Opinion of the New York State Supreme Court, Appellate Division, Second Judicial Department, Dated February 11, 1991 21
APPENDIX F 25
Opinion of New York State Supreme Court, Kings County (Gloria Cohen Aronin, J.), Dated June 15, 1989 25
APPENDIX G 33

Judgment of Supreme Court of the State of New York, Kings County (Gloria Cohen Aronin, J.), dated August 4, 1989 33
APPENDIX H ..... App. 37a
DECISION AND AWARD OF ARBITRATOR 37
JONAS SILVER, DATED SEPTEMBER 15, 1988 37
APPENDIX I 101
Portions of Collective Bargaining Agreement Between State of New York and United University Professions, dated May 12, 1986 101

Table of Authorities

Cases:
United Paper Worker's International Union v. Misco, 484 U.S. 29, 108 S. Ct. 364 (1987) ---------- 8, 10

New York State Constitution
Article 17, §3 ---------- 8,10

New York State Statutes
Public Health Law Section 2803-c, Ch. 648, L. 1975, p. 277 of the *New York State Legislative Annual - 1975.* ---------- 11
C.P.L.R. 7511 ---------- 8
C.P.L.R. 7511(e) ---------- 8

Public Health Law §2803-c ---------- 11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID YOUNG,

Petitioner,

against

STATE UNIVERSITY OF NEW YORK, HEALTH SCIENCE CENTER AT BROOKLYN, UNIVERSITY HOSPITAL and PAUL ROSENFELD, Acting Executive Director of University Hospital and UNITED UNIVERSITY PROFESSIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the New York State Court of Appeals denying leave to appeal is reported at 1992 N.Y. Lexis 1774. and is reprinted infra at App. 1a. The opinion and award of Arbitrator Jonas Aarons (on remand) dated March 23, 1992

is unreported and is printed infra at App. 2a. The opinion of the New York State Court of Appeals denying a motion for reargument of a motion for leave to appeal is reported at 78 N.Y.2d 1008;580 N.E.2d 1061;1991 N.Y. LEXIS 4090; 575 N.Y.S.2d 458 and is reprinted at App. 19a. The opinion of the New York State Court of Appeals dismissing a motion for leave to appeal is reported at 78 N.Y.2d 908; 577 N.E.2d 1060; 1991 N.Y. LEXIS 876; 573 N.Y.S.2d 468 and is reprinted at App.20a. The opinion at issue of the New York State Supreme Court, Appellate Division, Second Judicial Department is reported at 170 A.D.2d 510; 566 N.Y.S.2d 79; 1991 N.Y. App. Div. LEXIS 2076 and is reprinted at App. 21a. The opinion of the Supreme Court of the State of New York, Kings County (Gloria Cohen Aronin, J.), dated June 15, 1989 is unreported and is reprinted at App. 25a. The opinion and Award of Arbitrator Jonas Silver, dated September 15, 1988 is unreported and is reprinted at App. 37a.

JURISDICTION

The judgment of the New York State Court of Appeals denying leave to appeal to the Court of Appeals was entered on July 1, 1992 (App. 1a). This Court has jurisdiction pursuant to 28 U.S.C. Section 1254

.

STATUTORY PROVISION

N.Y.CPLR 7511 provides:

(a) **When application made.** An application to vacate or modify an ward may be made by a party within ninety days after its delivery to him.

(b) **Grounds for vacating.**

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.***

(c) Grounds for modifying. The court shall modify the award if:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.***

STATEMENT OF THE CASE

The employer (all respondents except United University Professions) and the Union (respondent United University Professions) were, at all times relevant here, parties to a collective bargaining agreement covering certain employees employed at University Hospital in Brooklyn, New York.[1]The agreement provided that discipline (including discharge) would be imposed only for just cause and contained a grievance arbitration provision entitling the employee or the union to take any to arbitration any "disciplinary grievance" not settled or otherwise resolved. Any penalty proposed in the employer's notice of discipline could not be implemented until and to the extent that it was uphld by the disciplinary arbitrator. The agreement further provided that a disciplinary arbitrator's decision with respect to guilt or innocence and penalty "shall be final and binding upon the parties" to the agreement.

On February 19, 1988, the employer issued a notice of discipline which proposed to terminate from State Service the Petitioner David Young, a Registered Respiratory Therapist, covered by the Agreement. The stated grounds for discharge were two specifications alleging that on February 8, 1988 on two occasions he used a syringe containing blood and fluid drawn from a patient to draw blod and fluid from an arterial line attached to a different patient contrary to established hospital practice. (App. 40a)

A grievance was filed protesting the notice of discipline. The parties were unable to resolve the grievance and the union and the employee took the matter to arbitration.

---

[1]Respondent United University Professions ("UUP") is the exclusive bargaining representative of the employees and was a party to the collective bargaining agreement with the Employer.

Under the collective bargaining agreement, there was a rotating panel of arbitrators agreed to by labor and management. The arbitrator selected by the parties was Jonas Silver, an experienced labor arbitrator.

The arbitrator found probable cause for the employer's prior suspension of the petitioner David Young and that he was guilty of the charge as specified in the Notice of discipline, but determined that the proposed penalty of termination was not appropriate. Instead, the penalty imposed was suspension without pay for eight work weeks (already served). He ordered the grievant reinstated to his former position of Respiratory Therapist with back pay and entitlements running from the expiration of the period of suspension to the date of reinstatement. Young was warned and admonished against any further breach of professional responsibilities. (App. 98a-99a)

In formulating a penalty, the arbitrator was of the opinion that Young's infractions constituted a first time offense. His previous eight year record of employment at the Hospital did not disclose any other examples of violations of professional performance relating to his work. Young had also received satisfactory appraisals for the period November 7, 1980 throught November 7, 1985 and individual category ratings ranging from good to excellent and outstanding. Young was appointed to permanent status as a Technical Specialist at the Hospital in April of 1986. Three physicians wrote letters supporting his permanent appointment who were familiar with his work at the Hospital. In recognition of his outstanding work, he was granted discretionary salary increases in the years 1981, 1982, 1983, 1985 and 1987. He was also given the responsibility of training a number of Respiratory Therapists at the Hospital. The arbitrator therefore considered that a penalty comensurate with the gravity of the wrongdoings without, "however maiming Young permanently as a Respiratory Therapist such as might very well be a likely consequence of termination, constituted the appropriate measure. He therefore imposed

an eight week suspension without pay and a warning. (App. 94a-99a)

The employer refused to comply with the arbitration award, but, instead, instituted this lawsuit (Article 78 Proceeding) under N.Y. C.P.L.R. 7511, seeking a judgment vacating that portion of the arbitrator's award which assessed an eight week suspension without pay on the grounds that the arbitrator exceeded his power and that the failure to dismiss Young as proposed was irrational and contrary to the public policy of the State of New York. In the alternative, the employer sought an order directing a rehearing before another arbitrator limited to the issue of penalty. In its petition, the employer alleged, *inter alia*, that the award contravened public policy. (App. 25a)

The union and David Young filed a cross motion pursuant to N.Y.C.P.L.R. 7511(e) to confirm the arbitrator's award. (Id)

The Supreme Court, Kings County held that the arbitrator's award as to penalty was in violation of the public policy of the State of New York, notwithstanding the collective bargaining agreement which permits the arbitrator to assess the appropriate penalty. The Court cited this Court's holding in *United Paper Worker's International Union v. Misco*, 484 U.S. 29, 108 S. Ct. 364 (1987) as its authority to vacate the award. The Court sought to find such public policy from a generalized statement of hospital health care in the state Constitution (Article 17.3) and from rules and regulations authorizing the Commissioner of Health to supervise and inspect the hospitals in the State of York. In addition the Court found further public policy from the Patient's Bill of Rights springing from the New York Public Health Law. The Court granted the petition and vacated so much of the award as directed a penalty of only two months suspension. The matter was remanded to a different arbitrator for "further proceedings not inconsistent with [the Court's] opinion." (App. 29a-32a, App. 33a) The Court

further provided in its judgment that the employer was authorized to terminate David Young forthwith. (App. 33a)

The Supreme Court of the State of New York, Appellate Division, Second Judicial Department unanimously affirmed. The Court concluded that the arbitrator's determination that the penalty of discharge was inappropriate violated the State's allegedly strong public policy of providing high quality, efficent, and effective hospital services which met generally accepted standards of professional medical practice in a clean, safe, and sanitary environment. (App. 23a) Thus, it was determined that the lower court did not err in vacating the reduction of the penalty imposed from discharge to a two month suspension.(Id)

A motion brought in the New York State Court of Appeals for leave to appeal was denied on June 4, 1991 on the ground that the order sought to be appealed from [at that time] did not finally determine the proceeding within the meaning of the New York State Constitution. (App. 20a) Reargument of that motion was denied. (App. 19a)

The Arbitration was then remanded to a different arbitrator in compliance with the Appellate Division's Order. Arbitrator Jonas Aarons heard the entire proceeding and issued a second Arbitration Award. (App. 4a) The second arbitrator felt bound by the prior judicial proceedings invalidating the prior penalty and therefore imposed a penalty of termination. (App. 14a - 18a)

A motion for leave to appeal to the Court of Appeals was then made on behalf of the petitioner David Young, which was denied on July 1, 1992 without opinion. (2) The arguments set forth herein involving *United Paperworkers International Union v. Misco, Inc.*, supra were advanced.

It is from the denial of the motion by the New York State Court of Appeals for leave to appeal that the Petitioner David Young seeks this writ of Certiorari. The union, not

having sought such a writ, has been joined as a party respondent herein.

In *United Paperworks International Union v. Misco*, supra, this Court held that while a Court may refuse to enforce a collective bargaining agreement when the specific terms contained in that agreement violate public policy, such public policy must be properly framed and the violation of such a policy must be clearly shown if an award is not to be enforced. Such policy must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed interests. A formulation of public policy based only on general considerations of supposed public interests is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective bargaining agreement.

Simply stated, the lower courts sought to artificially create a public policy from a state constitutional provision authorizing health care for the citizens, rules and regulations of the State Commissioner of Public Health giving him power and authority to inspect hospitals and the Patient's Bill of Rights emanating from the New York State Public Health Law. Using that approach, such a rationale could be utilized to discharge every single employee who works for a hospital who commits any errors who becomes involved in a disciplinary arbitration. In essence, it is the substitution of the Court's views for those of the disciplinary arbitrator chosen by the parties.

Article 17, Section 3 of the New York State Constitution does not prohibit arbitration of disciplinary matters or mandate termination for conduct involving patient care:

> The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and

> by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.

Certainly this language sets forth a general policy, not a specific one. There is no specific act of the New York Legislature which bans or limits arbitration of employee disciplinary grievances in the health care field. There is no local legislation in New York State which bars an arbitrator from imposing a penalty of less than termination in health care related disciplinary proceedings.

The lower courts' reliance on New York Public Health Law Section 2803-c as authority for a public policy limiting arbitration in the health care field is also misplaced, because it is at best applicable in a general manner to nursing homes and related facilities and not to this proceeding. See "Memorandum of Senator Karen S. Burstein" regarding *Public Health Law* Section 2803-c, Ch. 648, L. 1975, p. 277 of the *New York State Legislative Annual - 1975*. See also, "Governor's Memoranda on Bills Approved (including Ch. 648, L.1975, pp. 441-442 of the *New York State Legislative Annual-1975*.

Public policy grounds as the basis for vacatur of arbitration awards must be explicit, well defined and dominant and ascertained by referece to laws and legal precedents that are well defined and dominant and not from general considerations of supposed public interests. In this case, no patient injury is contained in the record. The first arbitrator weighed in his considerations the State's arguments concerning the effect of the grievant's conduct upon patients and the well being of the public, the fact that it was a first time offense, his eight years of service, letters of recommendation, performance appraisals, and five discretionary salary increases (awarded for superior performance) as being mitigating factors. He was thus penalized by the loss of two months pay. This took into

account his good employment record. No overarching public policy ground exists to support vacatur. Unless a policy prohibits in an absolute sense particular matters being decided or certain relief being granted by an arbitrator, an application to vacate an award should be denied.

The holdings below encourage employers to drag out the grievance process through court challenges to arbitration awards. Regardless of the disposition of any particular "public policy" challenge to an arbitration award, it is indisputable that the national labor policy is damaged by lack of finality and the delay that attends the efforts to secure judicial overturning of such awards. Where the effort succeeds, there is both a direct injury to the process of arbitration in that case and an example that will further encourage the filing of more such cases in court. The holdings below serve as an invitation that a broad degree of judicial creativity is available to employers who resist compliance with arbitration. Inevitably, such will serve as a beacon to guide other litigants to delay the process of arbitration, In a day and age of ever increasing litigation, parties are resorting to arbitration for expeditious resolution of their disputes. This has freed up the Courts to a certain extent from every heavily increasing burdens.

Respectfully submitted,

Arthur H. Grae
Attorney for Petitioner
5 Saunders Street
Hastings on Hudson, NY 10707
Telephone No. 914-478-5000

APPENDIX A

Opinion of the New York State Court of Appeals, decided July 1, 1992

In the Matter of State University of New York, et al.,

Respondents, v. David Young, et al., Appellants.

Mo. No. 488

COURT OF APPEALS OF NEW YORK

1992 N.Y. LEXIS 1774

July 1, 1992

OPINION: [*1]

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

APPENDIX A-1

ORDER OF NEW YORK STATE COURT OF APPEALS, DATED AND ENTERED ON JULY 1, 1992.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of thc Court, hcld atCourtof Appcals Hall in thc City of Albany on the first day of July A.D. 1992

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 488
In the **Matter of State University** of New York, et al-,

Respondents,

v.

David Young, et al.,
Appellants-

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon

the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Donald M. Sheraw
Clerk of the Court

APPENDIX B

Opinion of Arbitrator Jonas Aarons (On Remand), dated March 23, 1992

In The Matter Of The Arbitration Between

STATE UNIVERSITY OF NEW YORK HEALTH SCIENCE CENTER AT BROOKLYN

-and-

UNITED UNIVERSITY PROFESSIONS
(DAVID YOUNG, GRIEVANT)

The history of this case began when grievant Young received a Notice of Discipline dated February 19, 1988, stating that the Public Employer sought to terminate him for the following:

"1. On or about February 8, 1988, at approximately 2 a.m., while in the Extended Recovery Room at the University Hospital you used a syringe containing blood and

fluid drawn from an arterial line attached to patient number 24-2754/Maresca/to draw blood and fluid from an arterial line attached to patient number 25-4221/James/contrary to established Hospital practice.

"2. On or about February 8, 1988, at approximately 6:30 a.m while in the Extended Recovery Room of the University Hospital, you used a syringe containing blood and fluid drawn from an arterial line attached to patient number 25-4221/James/to draw blood and fluid from the arterial line attached to patient number 28-8754/Manzi/contrary to established Hospital practice."

Hearings were held before an Arbitrator, resultant from the filing of a grievance on behalf of grievant by the Un;ted University Professions. The hearings were held over a five-day period, and apparently a considerable amount of testimony was taken, as well as documentary evidence offered. The Issues in that matter were:

"1. Was there probable cause consistent with the terms of the Agreement between the UUP and the State to suspend David Young on

February 13, 1988? If not, what shall the remedy be consistent with that Agreement?

"2. Is David Young guilty of misconduct as specified in the Notice of Discipline dated February 19, 1988?

"3. Consistent with the terms of the Agreement between the UUP and the State, if he is guilty, is the proposed penalty of termination appropriate and, if not, what shall the appropriate penalty be?"

After an extended discussion of all of the Issues presented, including the proposed penalty, the Arbitrator awarded on September 15, 1988, as follows:

"1. State University of New York, Health Science Center, at Brooklyn, had probable cause to suspend Respiratory Therapist David Young effective February 13, 1988.

"2. David Young is guilty of the charge as specified in the Notice of Discipline dated February 19, 1988.

"3. The penalty of termination proposed by the State is not appropriate.

"4. The penalty imposed upon David Young shall be suspension without pay for eight work weeks effective February 13, 1988, to the termination of that eight work week period. Within a reasonable time after receipt of this Opinion and Award, State University of New York, Health Science Center at Brooklyn, shall restore David Young to his former position of Respiratory Therapist with back pay and entitlements running from the expiration of the period of suspension set forth above to the date of reinstatement.

"5. In effectuating 4, above, there shall be deducted from the amount of back pay, any earnings David Young may have gained from employment while under suspension, the objective being to make Young whole but not excessively whole for the period from the termination of the suspension directed in 4, above, to the date of reinstatement.

"6. David Young is directed to comply with all official requests made of him in connection with 4 and 5, above.

7. David Young is warned against any further breach of professional responsibilities.

Thereafter, the State commenced an action pursuant to Section 7510 and 7511 of the New York CPLR by way of Order

To Show Cause dated October 7, 1988, seeking to vacate, on public policy grounds the Award set forth above, in particular that part of the Award as directed the penalty of only two months' suspension without pay for the misconduct found by the Arbitrator. The UUP, on behalf of the grievant, at the proceedings before Judge Aronin sought to have the petition denied and crossmoved to confirm the Arbitration Award in accord with the provisions of CPLR 7511(e).

Judge Aronin found that the issue before her was:

> ". . . the appropriateness of vacating, on public policy grounds, an award arising out of a public sector arbitration brought to review the termination by State University of New York of respondent Young's employment. Although State

University of New York terminated Young, the arbitrator reduced the termination to suspension."

· The Judge, after reviewing the facts and considering the arguments, found that:

". . . the arbitrator's penalty aspect of the award to be irrational and violative of the public policy of the State of New York."

The Judge set forth the law to be, and I will quote, although excluding the citations set forth by Judge Aronin, as follows:

"It is well settled law that an arbitration award must be confirmed if it is neither violative of a strong public policy nor totally irrational. However, a Court is clearly justified in vacating an arbitration award on the ground that 'the arbitrator exceeded his power and made an irrational award in violation of a "public policy which is beyond the waiver."' Significantly, 'public policy, whether derived from, and whether explicit or implicit in statute or

decisional law, or in neither, may also restrict the freedom to arbitrate.'

...

"Indeed, whereas here, the award contravenes a strong public policy, which 'almost invariably involves an important constitutional and statutory duty or responsibility,' the Court may set aside the award.

"In the case at bar, it is established fact that respondent Young, used the same syringe to withdraw bodily fluids from various patients,-who were in grave physical condition. Moreover, the threat of infection from various blood-borne diseases such as AIDS (Acquired Immunodeficiency Syndrome) and hepatitis were the very real danger imposed by Young upon the patients hospitalized in the State University of New York at Health Center at Brooklyn.

"Significantly, it is clear that said patients, by virtue of their physical condition, were not in the position to supervise the quality of their care nor to protest the lack thereof in the State-run medical facility.

"Under these circumstances, the case at bar falls within 'the spectrum of situations in which the State of New York takes on responsibility to protect and care for individuals, particularly those who lack capacity.' And thus, the 'State's role as guardian' is 'inviolate as a matter of public safety' and cannot

be bargained away or otherwise abrogated.

"Thus, this Court finds, under the rare and compelling circumstances present herein, that the arbitrator's award, which reduced Young's discharge from State service, to a mere suspension without pay, is a violation of the public policy of the State of New York, notwithstanding the collective bargaining agreement which permits the arbitrator to assess the appropriate penalty. In so concluding, this Court is well aware that the determination of an award to be violative of public policy must be based on an important constitutional or statutory duty or decisional law, not just an assessment of general considerations of matters of public interest. Indeed, it is the strong public policy of the State embodied in the New York State Constitution and Public Health Law which the instant arbitrator's award fails to honor."

Judge Aronin goes on to state:

"Thus, in accordance with the aforementioned well settled public policy embodied in the Constitution, the Public Health Law, and legal precedents, this Court determines that the instant arbitration award is indeed violative of public policy.

"Moreover, the State's retention of the respondent herein, in violation of the aforementioned public policy, may expose the State to liability. This is especially true at this

time given the staggering number of persons afflicted with AIDS and the inability of medical science to cure this disease.

"Certainly then, the conduct of the respondent herein, which exposed the patients to the very real danger of contracting AIDS and other diseases clearly has exposed the hospital and State to liability. This fact provides this Court with an additional, compelling reason to conclude that the arbitrator's refusal to award termination is plainly irrational."

The Judge noted under the rubric "conclusion" as follows:

"The State's petition is granted, so much of the award as directed a penalty of only two (2) months suspension without pay is vacated, the instant matter is hereby remanded to a different arbitrator for further proceedings not inconsistent with this opinion. In the interim, petitioner may forthwith terminate respondent.

Thereafter, the State did in fact terminate grievant Young.

However, the determination by Judge Aronin was appealed to the Supreme Court of the State of New York, Appellate Division:Second Judicial Department, where the judgment made by Judge Aronin was affirmed. The

Appellate Division wrote inter alia, and I also exclude here citations, as follows:

"An arbitration award must be sustained if it is neither violative of strong public policy nor totally irrational, and the arbitrator did not exceed a specifically enumerated limitation of his or her power pursuant to CPLR 7511(b).
Here, as the Supreme Court correctly concluded, the arbitrator's determination that the penalty of discharge was inappropriate did violate the State's strong public policy of providing high quality, efficient and effective hospital services which meet generally accepted standards of professional medical practice in a clean, safe, and sanitary environment. This is particularly so in view of the fact that the incident involved was not an isolated one and that Young continued to engage in this potentially life threatening conduct after he was repeatedly instructed to desist. Thus, the Supreme Court did not err in vacating so much of the arbitrator's award as reduced the penalty imposed by the petitioners from discharge to a two month suspension."

Thereafter, the matter was appealed to the Court of Appeals of the State of New York, which Court, on June 4, 1991, dismissed the appeal on the ground that the Order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution.

Thereafter, the dispute here regarding the penalty to be imposed on grievant Young was submitted to the undersigned, with the parties submittlng memoranda in support of their respective positions prior to a hearing held in Albany, New York, on January 27, 1992, at whichhearing counsel for the grievant and the State had a full opportunity to be heard on this matter, both regarding the facts and arguments in support of their respective positions.

As I view it, the Issue to be determined by the undersigned is the penalty to be imposed in light of the judicial proceedings had following the issuance of the initial Arbitration Award.

The parties have submitted substantial memoranda in support of their respective positions, the full record before the varying judicial bodies, as

well as their memoranda submitted to the initial Arbitrator, for me to consider.

Simply put, it is the position of the State here that I must render an Award consistent with the determinations of the judicial authorities of the Supreme Court and the Appellate Division.

The UUP, on the other hand, argues on behalf of the grievant that I am not bound by the decision of Judge Aronin, nor the affirmation thereof by the Appellate Division, but rather, I have independent jurisdiction to make a determination regarding penalty based upon my review of the matter with guidance, or even more, from the Award of the initial Arbitrator here. The UUP, in fact, argues that I should affirm the penalty initially imposed by the original Arbitrator that is, the eight week suspension without pay. Failing that, I may impose my own penalty, but such should not be in the form of termination

as proposed by the judicial officers who had had this case before them.

The above is a generalized outline of the background of this dispute. I have not set forth the full details in exquisite form, but I have considered all of the relevant arguments and authorities offered by the partles in support of their respective positions, although such may not be set forth herein at length.

The matter is properly before me for determination.

AWARD

I have considered this matter most carefully inasmuch as I believe it is important to protect the integrity and authority of arbitrators and their awards. However, a careful examination and consideration of the decisions of the Courts involved here and the citations offered by the parties in support of their positions leads me to the

conclusion that I have no alternative, considering all of the above as well as how I view the collective bargaining agreement, but to find that the grievant must be terminated.

I make the above decision on the basis of the entire record before me, which includes the Arbitrator's Award initially rendered in this case, the totality of the facts relating to the misconduct, at least as such has been proffered to me in the initial Arbitration Award as well as the judicial decisions, the collective bargaining agreement, and all of the other relevant circumstances.

In light of the conclusions reached hereinabove, I see no reason to discuss any other evidence or arguments submitted herein by the parties; suffice it to say I have considered all of the relevant, material and pertinent evidence

and arguments submitted, although such may not be set forth herein at length.

AWARD

The termination of the grievant David YounG is affirmed.

DATED: March 23, 1992

Respectfully submitted,

s/JONAS AARONS, ARBITRATOR

AFFIRMATION

In accordance with Section 7505 of the Civil Practice Laws and Rules, I hereby affirm that I have executed the foregoing as my Opinion and Award in the above-captioned matter.

S/JONAS AARONS, ARBITRATOR

APPENDIX C

Opinion of the New York State Court of Appeals, dated September 12, 1991

In the Matter of State University of New York, et al.,

Respondents, v. David Young, et al., Appellants

Mo. No. 819

Court of Appeals of New York

78 N.Y.2d 1008; 580 N.E.2d 1061; 1991 N.Y. LEXIS 4090; 575 N.Y.S.2d 458

September 12, 1991

OPINION: [*1]

Motion for reargument of motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

APPENDIX D

Opinion of the New York State Court of Appeals, dated June 4, 1991

In the Matter of State University of New York, et al.,

Respondents, v. David Young, et al., Appellants

Mo. No. 394

Court of Appeals of New York

78 N.Y.2d 908; 577 N.E.2d 1060; 1991 N.Y. LEXIS 876; 573 N.Y.S.2d 468

June 4, 1991

OPINION: [*1]

Motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution.

APPENDIX E

Opinion of the New York State Supreme Court, Appellate Division, Second Judicial Department, Dated February 11, 1991

In the Matter of State University of New York, et al.,

respondents, v. David Young, et al., appellants

No. 653E

Supreme Court of New York, Appellate Division, Second Department

170 A.D.2d 510; 566 N.Y.S.2d 79; 1991 N.Y. App. Div. LEXIS 2076

January 3, 1991, Submitted

February 11, 1991

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:

In a proceeding pursuant to CPLR article 75 to vacate so much of an arbitrator's award as imposed upon David Young the penalty of a two-month suspension from his employment as a Registered Respiratory Therapist, David Young and United University Professions appeal from a judgment of the Supreme Court, Kings County (G. Aronin, J.), entered August 4, 1989, which vacated that part of the award and remitted the matter to a different arbitrator for a new determination as to an appropriate penalty.

DISPOSITION: ORDERED that the judgment is affirmed, with costs.

COUNSEL: Bernard F. Ashe, Albany, New York, (Rocco A. Solimanlo and Ivor R. Moskowitz of counsel), for appellants.

Robert Abrams, Attorney-General, New York, New York (Stephen M. Jacoby of counsel), for respondents.

JUDGES: Richard A. Brown, J.P., Vincent R. Balletta, Jr., Albert M. Rosenblatt, David S. Ritter, JJ., concur.

OPINION: DECISION & ORDER

The appellant David Young was discharged from his employment as a registered respiratory therapist at University Hospital of the State University of New York, Health Science Center at Brooklyn, as a result of his having [*2] used the same syringe to draw blood from several crtically ill patients after being warned several times of the dangers of that practice. He thereafter availed himself of the arbitration procedure provided for in the collective bargaining agreement with the State University of New York. After a hearing the arbitrator determined that Young's conduct constituted a serious "breach of aseptic technique * * * in violation of mandated Hospital Procedure", which jeopardized the health of patients already in grave medical condition. Nonetheless, the arbitrator concluded that, given

the fact that Young had been employed by the hospital for some eight years without other examples of violations of professional performance, discharge was inappropriate. Instead, the arbitrator imposed a penalty of two months suspension without pay. The

State University of New York thereupon commenced this proceeding to vacate so much of the arbitrator's award as imposed that penalty, as violative of the State's strong public policy to protect and care for its patients, particularly those who are unable to care for themselves. The Supreme Court concluded that the lesser penalty imposed by the arbitrator did, in [*3] fact, violate that public policy, and vacated that portion of the arbitrator's award. Young and the union of which he is a member appeal, and we affirm.

"An arbitration award must be sustained if it is neither violative of a strong public policy nor totally irrational, and if the arbitrator did not exceed a specifically enumerated limitation of his or her power pursuant to CPLR 7511(b) "(Matter of Grace Plaza of Great Neck v Turner, 130 AD2d 746, 747). Here, as the Supreme Court correctly concluded, the arbitrator's determination that the penalty of discharge was inappropriate did violate the State's strong public policy of providing high quality, efficient, and effective hospital services (see, Public Health Law @ 2800) which meet generally accepted standards of professional medical practice (see, 10 NYCRR 405.7[f][1]; 405.14[b]) in a clean, safe, and sanitary environment (see, 10 NYCRR 405.7[b][3]; 405.11). This is particularly so in view of the fact that the incident involved was not an isolated one and that Young continued to engage in this potentially life-threatening conduct after he was repeatedly instructed to desist (see, Matter of Ford v Civil Serv. Employee [*4] Assn., 94 AD2d 262; cf, Matter of Grace Plaza of Great Neck v Turner,

130 AD2d 747, supra). Thus, the Supreme Court did not err in vacating so much of the arbitrator's award as reduced the penalty imposed by the petitioners from discharge to a two-month suspension.

APPENDIX F

Opinion of New York State Supreme Court, Kings County (Gloria Cohen Aronin, J.), Dated June 15, 1989

MEMORANDUM DECISION OF JUSTICE GLORIA COHEN ARONIN, DATED JUNE 15, 1989

SUPREME COURT, KINGS COUNTY, TRIAL TERM, PART 24
By Gloria Cohen Aronin, J.
Dated June 15, 1989
Index No. 23711/88

In the Matter of the Application of
State University of New York, et al.,
Petitioners For a Judgment Pursuant to Section 7510 and 7511 of the CPLR against David Young and United University Professions, Respondents.

In this proceeding, petitioners seek an order pursuant to CPLR 7511(a) directing that the portion of an arbitrator's award assessing an eight (8) week suspension without pay against David Young, a respondent herein, be vacated on the grounds that the arbitrator exceeded his power and that, insofar as the penalty imposed was other than the proposed dismissal of respondent Young from state service, the award was irrational and contrary to the pu~lic policy of the State of ~ew York.

Accordingly, pursuant to CPLR 7511(c), petitioners seek an order modifying the penalty aspect of the award. In the alternative, petitioners seek an order directing a rehearing before another arbitrator limited to the issue of penalty. Respondentsoppose the instant application, requests that the petition be denied, and cross-moves to confirm the subject arbitration award pursuant to CPLR 7511(e).

Thus, the issue presented before this court is the appropriateness of vacating, on public

policy grounds, an award arising out of a public sector arbitration brought to review the termination by State University of New York of respondent Young's employment. Although State University of New York terminated Young, the arbitrator reduced the termination to suspension.

The undisputed facts, as resolved by the arbitrator, reflect that Young, a respiratory therapist employed by the hospital for eight 18) years, had used one syringe to draw blood from several critical-care patients on several occasions. Moreover, the arbitrator found that Young's denial of the aforesaid facts could not be credited due to the presence of contradictory physical evidence; the forthright *manner* of the state's witnesses, and certain remarks made by Young h~mself which constituted an ~admission of a break in sterile safeguards~. **Accord**ingly, the arbitrator found that the aforesaid ~breach of aseptic technique. . .must per force be regarded as a serious matter warranting the conclusion that, in so doing, Young, as a Respiratory Therapist, committed a violation **of mandated hospital procedure~.**

Indeed, the arbitrator went further to note that Young,

> "By inserting an already used large syringe containing the body fluid of a patient in the course of drawing a blood sample from **the arterial line of another patient, Young exposed the succeeding patient to the transmission of infectious bacteria and virus thus jeopardizing the health of patients already in grave medical condition. He continued his initial breach of unalterable sterile procedure despite the protests of an observing nurse".**

Notwithstanding these observations, the arbitrator determined that the penalty commensurate with Young's wrongdoing was a mere eight (8) week suspension without pay, rather than the termination imposed by the state. For the reasons which follow, this court finds .the arbitrator's penalty aspect of the award to be irrational and violative of the public policy of the State of New York

LAW

It is well settled law that an arbitration award must be confirmed if it is neither ~violative of a strong public policy nor totally irrational. Matter of Albany County Sheriff's Local 775 (County of Albany), 63 NY 2d 654; Matter of Sprinzen [Nomberg], 46 NY 2d 623, 630; Matter of Grace Plaza of Great Neck, Inc. v. Turner, 120 AD 2d 746, 747). However, a court is clearly justified in vacating an arbitration award on the ground that "the arbitrator exceeded his power and made an irrational award in violation of "a public policy which is beyond waiver." (Matter of Ford v. Civil Service Employees Assoc., 94 AD 2d 262,266, quoting from City of New York v. Uniformed Firefighters Assn. Local 94, IAFF AFL-CIO, 58 NY 2d 957, 959: see also Matter of Silverman (Benmor Coats), 61 NY 2d 299) Significantly, "public policy, whether derived from, and whether explicit Or implicit in statute or decisional law, or in neither, may also restrict the fxeedom to arbitrate." Matter of Ford v. Civil Service Employees Assoc., supra, at p. 266.

Indeed, where as here the award cotravenes a strong public policy, which "almost invariably involves an important constitutional or statutory duty or responsibility, the court may set aside the award. (Port Jefferson Station Teacher's Association, Inc v. Brookhaven-Comsewogue Union Free School District, 45 NY 2d 898, 899; Matter of Ford v. Civil Service Employees Assoc., supra, at p.266).

In the case at bar, it is established fact that respondent Young, used the same syringe to withdraw bodily fluids from various patients who were in grave physical condition. Moreover, the threat of infection from various blood borne disease such as AIDS (Acquired Immunodeficiency Syndrome) and hepatitis was a very real danger imposed by Young upon the patients hospitalized in the State University of New York at Health Science Center at Brooklyn (see, Matter of LaRocca v. Dalsheim, 120 Misc. 2d 697, 699, 703; District 27 Community School Board v. Board of Education of the City of New York, 130 Misc. 2d 398, 404).

Significantly, it is clear that said patients, by virtue or their physical condition, were not in a position to supervise the quality of their care or protest the lack thereof in the state run medical.facility

Under these circumstances, the case at bar falls within "the spectrum of situations in which the State of New York;takes on responsibility to protect and care for individuals, particularly those who lack capacity. And thus, the "state's role as guardlan" is "inviolate as a matter of public

safety" and cannot be bargained away or otherwise abrogated. (Matter of Ford v. Civil Service Employees Assoc , supra, at p. 262-263).

Thus, this court finds, under the rare and compelling circumstances present herein, that the arbitrator's award, which reduced Young's discharge from state service, to a mere suspension without pay, is in violation of the public policy of the State of New York, notwithstanding the collective bargaining agreement which permits the arbitrator to assess the appropriate penalty. In so concluding, this court is well aware that the determination of an award to be violative of public policy must be based on an important constitutional or statutory duty or decisional law, not just an assessment of general considerations of matters of public interest. (Port Jefferson Station Teacher's Assoc., Inc. v. Brookhaven-Comsewogue Union Free School District, supra, at p.899; United Paper Worker's International Union v. Misco, Inc., _ U.S. _, 108 S. Ct. 364, 373; Matter of Ford v. Civil Service Employees Assoc., supra) Indeed, it is the strong public policy of the state embodied in the New York State Constitution and Public Health Law which the instant arbitrator's award fails to honor.

> The New York State Constitution, Article 17, 3 provides that the "protection and promotion of the health of the inhabitants of the state are matters of public concern" and entrusts this responsibility to the state. To effectuate this strong constitutional policy, the Legislature enacted Public Health Law 2800 which provides:
>
> "Hospital and related services. . .are of vital

> concern to the public health. In order to provide for the protection and promotion of the health of the inhabitants of the state. . .the Department of Health shall have the central comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services. . ."

Thus, hospitals are charged by statute with the obligation of providing high quality, efficient and effective services. (Matter of Fritz v. Huntington Hospital, 39 NY 2d 339, 348).

Moreover, the legislature provided the Commissioner of Health with the power to supervise and inspect hospitals for the fitness and adequacy of the personnel, rules and by laws, and standards of medical care.(PHL 2803 (1) (a)). Hence, this court can only conclude that the protection of patients in hospitals is indeed a strong public policy. Additionally, Public Health Law Section 2803-c entitled "Rights of Patients in Certain Medical Facilities", provides that it is the public policy of the state that every patient shall have the right to receive adequate and appropriate medical care.

The respondents seek to defeat the application of this "public policy" to the case at bar, relying on the statute itself which applies to nursing homes. However, :respondents opposition can be to no avail. While this bill of rights is applicable to nursing homes, the hospital has recognized these rights and incorporated them into "The

Patient Bill of Rights" which is part of the hospital's Policy and Procedure Manual.* Nor does it seem that the hospital's adoption of a similar bill of rights appears to be inappropriate. Indeed, Public Health Law 2803(g) specicically provides that:

> "The commissioner shall require that every general hospital adopt and make public an identicical ststement of the.rights and responsibilities of patients..."

Secondly, there is certainly no logic or reason to restrictively apply the aforementioned public policy to nursing homes, and not to hospitals . Indeed, all sections of a law, statute or regulation must be read together and harmonized with each othei so as to give effect and meaing to the entire law (McKinney's Statutes, Book 1, Section 98)

Thus, in acccordance with the aforementioned well settled public policy embodied in the constitution, the Public Health Law, and legal precedents, this Court determines that the instant arbitration award is indeed violative of public policy.

Moreover, the states retention of the respondent herein, in violation of the aforementioned public policy, may expose the state to liability. This is especially true

---

* The respondents oppose the court's consideration of this, as well as other documents, submitted by petitioner in support of its public policy argument. However, that the arbitrator was not fully presented "with the vast array of public policy expressions which require facatur of the award", dows not preclude this court from considering said document. (see, Matter of Ford v. Civil Service Employees Assoc., supra, at 266)

at.this time given the staggering number of persons afflicted with AIDS and the inability of medical science to cure this disease.

> Certainly then, the conduct of the respondent herein, which exposed the patients to the very real danger of contracting AIDS and other diseases clearly has exposed the hospital and the state to liability. This fact provides this court with an additional, compelling reason to conclude that the arbitrator's refusal to award termination is plainly irrational. (Matter of Ford v. Civil Service Em~loyees Assoc., supra, at 265)

CONCLUSION

The state's petition is granted, so much of the award as directed a penalty of only two (2) months suspenslon without pay is vacated, the instant. matter is hereby remanded to a different arbitrator for further proceedings not inconsistent with this opinion In the interim, petitioner may forthwith terminate respondent.

Settle order on notice. .

s/JUSTICE GLORIA COHEN ARONIN

APPENDIX G

Judgment of Supreme Court of the State of New York, Kings County (Gloria Cohen Aronin, J.), dated August 4, 1989

At an I.A.S Part 24 of the Supreme Court of the State of New York, held in and for the County of Kings at the Courthouse at 360 Adams Street in the City of Brooklyn, New York on the 4th day of August, 1989.

P R E S E N T :

HON. GLORIA COHEN ARONIN,

Justice

Justice.

In the Matter of the Application of STATE UNIVERSITY OF NEW YORK, HEALTH SCIENCE CENTER AT BROORLYN, UNIVERSITY HOSPITAL and PAUL ROSENFELD, Acting Executive Director of University Hospital,

Petitioners,

For a Judgment Pursuant to Section 7510

and 7511 of the CPLR,

-against-

DAVID YOUNG and UNITED UNIVERSITY PROFESSIONS,

Respondents.

X-

Petitioners, the STATE UNIVERSITY OF NEW YORK, HEALTH SCIENCE CENTER AT BROOKLYN, UNIVERSITY HOSPITAL ("HOSPITAL") and PAUL ROSENFELD, Acting Executive Director of University Hospital, having commenced this action pursuant to Section 7510 and 7511 of the CPLR by way of Order To Show Cause dated October 7, 1988 seeking to vacate, on public policy grounds, an award arising out ' of an arbitration brought to review the determination by the HOSPITAL to terminate respondent DAVID YOUNG's employment; and

Respondents DAVID YOUNG and UNITED UNIVERSITY PROFESSIONS having filed their Answer and reply papers dated November 9, 1988; and

NOW, upon reading and filing the verified petition of the HOSPITAL. and PAUL ROSENFELD, dated October 6, 1988, and the exhibits annexed thereto as well as the accompanying memorandum of law, also dated October 6, 1988; and

NOW, upon reading and filing the Answer and of respondents DAVID YOUNG and UNITED UNIVERSITY PROFESSIONS verified November 9, 1988; and

This matter having duly come on to be heard before the Court on the 23rd day of November, 1988 and ROBERT ABRAMS, Attorney General of the State of New York (TARQUIN JAY BROMLEY, ; Assistant Attorney General, of Counsel), havng appeared as attorney for petitioners and BERNARD F. ASHE, Esq. (IVOR

R.MOSKOWITZ, of CounSel) having appeared as attorney for·respondents, the matter havng been submitted to the Court on that date, due deliberation having been had and the Court having issued its ,memorandum decision dated June 15, 1989;

IT IS HEREBY ORDERED that, in conformance with the memorandum decision dated June 15, 1989, a copy of which is attached hereto, the petitlon is granted, so much of the award as directed a penalty of only two (2) months suspension without pay is vacated and the instant matter is hereby remanded to a different arbitrator for further proceedings not inconsistent with the memcrandum decision. In the interim, petitioners may forthwith terminate respondent. ENTER

s/GCA

JUSTICE GLORIA COHEN ARONIN

WILBUR A. LEVIN, Clerk

FILED s/ 1989 Aug 4 2:20 p.m Kings County Clerk's Office

APPENDIX H

DECISION AND AWARD OF ARBITRATOR JONAS SILVER, DATED SEPTEMBER 15, 1988

STATE OF NEW YORK, GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS

DISCIPLINARY GRIEVANCE ARBITRATION

STATE OF NEW YORK, HEALTH SCIENCE CENTER AT BROOKLYN, UNIVERSITY HOSPITAL

and

) AWARD

UNITED UNIVERSITY PROFESSIONS

(DAVID YOUNG, GRIEVANT)

SEP 19 1988

Office of the University Counsel

APPEARANCES: For the State

Sanford Levine, University Counsel

By: Pamela M. Williams, Esq., Assistant Counsel

For United University Professions

Bernard Ashe, Esq., General Counsel, NYSUT-UUP

By: Ivor R. Moskowitz, Esq.

BEFORE: Jonas Silver, Arbitrator

Pursuant to the Agreement between the parties, the undersigned was appointed by OER on March 23, 1988 to hear and decide the issues set forth below. Hearing was held in New York City on April 11, May 19, June 20, July 14 and August 8, 1988 at which full opportunity was afforded the parties to present evidence and argument in support of their respective contentions. By August 29, the Arbitrator was in receipt

of briefs. The Issues As stipulated, the issues are:

1. Was there probable cause consistent with the terms of the Agreement between the UUP and the State to suspend David Young on February 13, 1988? If not, what shall the remedy be consistent with that Agreement?

2. Is David Young guilty of misconduct as specified in the Notice of Discipline dated February 19, 1988?

3. Consistent with the terms of the Agreement between the UUP and the State, if he is guilty, is the proposed penalty of termination appropriate and, if not what shall the appropriate penalty be?

Suspension and Notice of Discipline

Proceeding under 19.7(a)(1) of the Agreement, Diana J.Goldwasser, Deputy Director, Labor Relations, Health ScienceCenter, notified David Young, a Registered Respiratory Therapist employed at the University Hospital, that he was

suspended withoutpay effective February 13, 1988. By Notice of Discipline dated February 19, issued by Goldwasser, Young was notified of theimposition of discipline (proposed termination) for the following"specific acts and conduct:

> 1. On or about February 8, 1988 at approximately 2:00 a.m.,while in the Extended Recovery Room at the University Hospital, you used a syringe containing blood and fluiddrawn from an arterial line attached to patient No.24-2754 /Maresca/ to draw blood and fluid from an arterial line attached to patient No. 25-4221 /James/ contrary to established Hospital practice.
>
> 2. On or about February 8, 1988, at approximately 6:30 a.m., while in the Extended Recovery Room of the University Hospital, you used a syringe containing blood and fluid drawn from an arterial line attached to patient No. 25-4221 /James/ to draw blood and fluid from the arterial line attached to patient No. 28-8754/Manzi/, contrary to established Hospital practice.

Background

As a Respiratory Therapist, Young was assigned to the 12 Midnight to 8 AM shift at the University Hospital ("Hospital").

His duties on February 8, 1988, took him to the Extended Recovery Room (ERR") attending to patients (of whom there were four) whose post open heart surgery required that he draw arterial blood samples. The samples are used to test for the level of blood gases at four hour intervals. Once obtained by the Respiratory Therapist, the sample is brought to the lab by him and the results transmitted for entry on the patient's chart and assessment by the Doctor. Testimony was received from Lynne Karenfil, Senior Nurse Epidemiologist in the Infection Control Department of the Hospital and from Dr. Gerald Wolf, Vice-Chairman of the Department of Anesthesiology, Chairman of the Quality Assurance Committees, and then Medical Director of Respiratory Therapy, as to the procedure used at the Hospital to obtain arterial blood gases from a patient's arterial line.

The procedure employs an aseptic technique whereby the patient's arterial line is linked to a line leading to a pressurized bag operated by means of a transducer so as to flush the line containing a heparinized saline solution thereby keeping it open to the patient's arterial line. By manipulating the valve controlling the port on the stopcock of the patient's line, a back flow of in-line fluid is aspirated by and into a large syringe attached to the stopcock port together with emerging arterial blood. After a sufficient amount of fluid and blood has entered the large syringe as a forerunner of the patient's undiluted blood, the large syringe is removed and disposed of. A small syringe is then inserted in the stopcock port to capture the actual blood sample brought to the lab. The entire arterial line is then flushed clean by means of a pressurized saline solution.

The steps involved in the procedure are contained in a document, part of the Respiratory Therapy Policy and Procedure Manual, revised as of April 1987, maintained on the open book shelves of the Respiratory Therapy Office. The procedure was characterized in the testimony of UUP witness Dr. Peter B. Kane, Associate Professor of Anesthesiology, Health Science Center at Syracuse, as a "worthwhile one and worthy of being followed, nand by Dr. Wolf as standard for the Respiratory Therapist while variable for a Doctor who may be taking arterial blood gas samples. After certain preliminary steps including the preparation of a 3cc syringe with heparin to prevent clotting, the Respiratory Therapist cleans the stopcock (mid-line) with an alcohol swab; then inserts the lOcc syringe into the closed port; rotates the handle on the stopcock so the syringe can withdraw or aspirate in line-fl~id and blood; after the lOcc

syringe begins to withdraw arterial blood approximately 5cc's, closes stopcock and dispose/s/ of entire syringe;" inserts 3cc heparinized syringe into closed stopcock port; opens port, rotating stopcock handle; withdraws .S to 1.5cc's of arterial blood; closes stopcock to patient and flushes arterial line so saline solution flushes freely on a sterile gauze; clears stopcock port with alcohol gauze; closes stopcock to atmosphere and flushes pressurized solution through entire arterial line until it runs clear; holds 3cc syringe vertically and manipulates to remove air bubbles; caps syringe; on lab slip marks certain patient indications and checks off tests required by the physician; then delivers syringe and lab slip to the laboratory; the laboratory performs blood gas analysis as soon as possible and reports the results immediately for the therapist, recording all results in the arterial blood gas analysis log book; finally, after analysis

is completed, the Respiratory Therapist will record all values on the appropriate clinical sheet. The-procedure document notes under heading "Complications; 1. Infection. The syringe with blood can carry potential pathogens in it. Be sure stopcock ports are thoroughly cleaned and capped to insure proper aseptic technique. "
(Underscoring in original.)

As described by Dr. Wolf, the use of an alcohol swab to clean the stopcock port, though in the official procedure, is of limited value. While it will remove evident blood particulates, principle reliance is placed on flushing the line with a saline solution. Even sterilizing with a saline solution, as Dr. Wolf further indicated, will not serve to eliminate the presence of bacteria and virus on the stopcock port. Hence to avoid the introduction of foreign pathogens from one patient to another, the procedure mandates that the 10cc syringe used to start the aspiration of fluid and

blood be discarded and not used from one patient to another. In this way the possibility for the transmission of infectious diseases, whatever the degree of probability,* which may lodge in the already used syringe of another patient were that syringe to be inserted in the stopcock port of the arterial line of a subsequent patient, is eliminated.

* High" in Dr. Wolf's opinion; "miniscule" in Dr. Kane's opinion.

Dr. Kane testified that in his procedure for drawing blood samples, he would not go from patient to patient with the same syringe and would stop anybody doing so because of the possibility of spreading disease. Dr. Kane testified further that once he brought this usage to the attention of anybody doing so, he

~would expect him to stop and if he did not stop, I might file an incident report. . .I would refer the matter to the supervisor to write an incident report."

The specifications of the charge against Young allege that early on Februarv 8, he used the same syringe containing blood and fluid from the arterial line of patient Maresca to draw blood and fluid from the arterial line of patient James and again later that morning used the same procedure to involve a succession from patient James to patient Manzi. In support of the allegations, the State relies on the testimony of RN Janet Nelson and RN Eulalee Muir on duty in the ERR at the same time as Young who assert that they witnessed all or part of such mode of operation by Young.

In defense Young maintains that he did not use the same syringe from one patient to another. Rather, he asserts, that on the first go round he employed a separate and fresh syringe in drawing blood and fluid

from patient to patient, discarding each before going on. What he did do was to use a technique of his own devising to clean the stopcock port by reinserting the same aspirated syringe on a patient's arterial line, pulling back so as to create a vacuum to dry up the tip of the port while flushing the line. On the second occasion, he made a mistake relative to drawing Manzi's blood sample by failing to note that he had not obtained the utlimate blood sample and so had to start over again with the same syringe containing Manzi's first aspirate.

The Testimony of Nelson and Muir

In substance, Nelson testified on direct that she was caring for James and Manzi when she first saw Young who came into the ERR between 1:30 and 2 AM to draw blood. Young then went to patient Wellington in an isolation room. When he came out, Muir asked Young for a drop of blood from Wellington. Young had two

syringes in his hand, one large containing a mixture of blood and fluid which he handed to Muir. Muir said she wanted blood, not a mixture. Young took back the big syringe and kept it in his possession. Nelson's testimony on direct continues in which she states that Young ~then aspirated from a female patient /Maresca/ with this syringe. n After Young left the female patient, he went to James' bed and there she saw him use the same syringe to aspirate. Nelson said nothing to Young because Hshe couldn't believe what she saw." At this point, according to Nelson, she told Muir that Young "was using one syringe from one patient to the other" to which Muir replied -- "Are you mad?" Nelson answered "Yes, it happened."

Later that morning between 6:30 and 7 AM, Nelson was at patient Manzi's bed. Young came with a syringe "already containing bloody fluid. She saw him "set the syringe on top of Manzi's respirator, remove the

stopcock and proceed to aspirate the same syringe on Manzi's line. When Nelson questioned the procedure, Young said "there was nothing wrong because he was aspirating, not injecting. nNelson then asked Young whether he would like someone else to do it. Young replied, according to Nelson, that he ~was right, there was nothing wrong, I have been doing it right along. You don't know how long I have been doing this. nMuir then "started talking to Young and took him by the arm."

On cross with regard to the events between 1:30 and 2 AM, Nelson indicated that Muir wanted a drop of blood from Wellington in order to test for glucose; that she did not see Young drawing blood from Wellington. . .nbut that was the first patient he came to, nadding that Young would have drawn blood from another patient "only if he had come in with it;" that from Wellington, Young went to Maresca where, "paying attention" to his movement from six feet away and viewing him

frontally, she saw Young draw fluid from the female, "maybe" using a 12cc syringe. She testified further that she did not see a syringe "sticking out of Young's pocket" that she estimated with regard to Wellington that the syringe had two to three cc's of fluid; that with reference to the female patient, the same syringe was used to add about 6cc's; and that with reference to James about 3cc's were added to the syringe as she viewed that patient across from Maresca.

With regard to the events of later that morning, Nelson testified on cross that she was behind the curtain giving Manzihis bath when Young entered followed by Muir. Young had with him a large syringe containing fluid and a small syringe without blood in it. As for Young's reply to her regarding his method, Nelson indicated that she did not know what he meant by aspirating one way or the other.

In substance, Muir testified on direct that she was assigned to Wellington in

particular when she saw Young come into the ERR, take blood from Wellington's arterial line in a big syringe and take a small, heparinized syringe from his pocket in which he took a blood sample. She asked Young to give her a specimen of blood which she needed for a chemical test. He had a big syringe with aspirated blood in one hand and a small syringe with blood in the other. He handed her the large syringe which she said she did not want; then he gave her a drop of blood from the small syringe. Muir testified that she told Young not to take the big syringe out of the room -- that it had to be discarded. She testified further that Young then went to Maresca's bed -- "his back to me, I saw him but could not see his hands.~ Muir then saw Young move from Maresca's bed to James' bed. Muir could not see James, adding that Nelson could see standing between Maresca and James. Nelson said to Muir -- "He's using the same syringe," to which Muir

replied -- "Are you mad?" Muir then went over to James' bed and saw Young "with a big syringe in James' line; I said you have to use clean syringes for each patient. . .like changing gloves. . . discard it. " Young did not say anything. According to Muir, she saw an amount of aspirate in the big syringe which was more than the start for one patient and the size of the line. She discussed with Nelson what had happened and they decided to see what would happen on the next round for drawing blood samples.

Muir's testimony continues that between 6 and 6:15 AM, she saw Young take Wellington's blood gas specimen. She told Young to discard the big syringe which he did. Young then moved to Maresca, reached into a container and took out a clean syringe. At this point Muir went away but returned when Young finished and went to James' bed. Muir followed, and according to her testimony, saw that Young "had a

syringe with already aspirated blood in James' line.~ Muir said -- nYou have to use a clean syringe for each patient; you cannot go from one to another. nYoung replied that "he only used it to pull back. nMuir "grabbed it away and gave him a new syringe.~ Muir then went to Wellington following which she came to Manzi behind Young. There she saw him use a big syringe containing aspirated blood which he first placed on the respirator top. She said -- "You can't do this." Young replied __ " I only use to pull back." Muir then spoke to the Supervising Nurse.

On cross, Muir testified with reference to the first go round, that at James' bedside the big syringe was "pulled way back," three-quarters full or about 9 to 10cc's in a syringe "usually" of 12cc capacity; that she did not see Young discard Wellington's syringe; that she did not know if Young took Wellington's syringe to Maresca's bed; that at James'

bed she saw the aspirated syringe in Young's hand but did not know whose fluid was in the syringe; and that at James' bed, Young discarded the aspirated syringe and went on to Manzi's bed.

With regard to the events on the second go round, Muir testified on cross, that Young discarded a "big syringe" after drawing from Wellington, moved to Maresca' bed and on to James' bed. She testified further that she could not see if Young had a syringe in his hand when he left Maresca's bed -- there are a lot of disposal canisters and he need not have turned around to discard. Muir further testified that she was close behind as Young went from Maresca to James and that if he had taken out a fresh syringe from his pocket, she would have seen it. She indicated that it was at James' bed that she saw an aspirated syringe in Young's hand for the first time. There she saw him take a syringe from his hand with about

5cc's of aspirate and insert it in James' line. She indicated further that she did not know where the syringe came from.

The Testimony of Young

In substance, Young testified that at about 1 -AM on February 8, he questioned Nelson at James' bed as to whether any patients were under precaution regarding drawing blood or fluid because of infection. She said "we" do not know. His concern was about Wellington in the isolation room. It was not until about 2 AM, having been "suspicious" of his status and finding out from the "nurses" that he was not under precaution, that he drew Wellington's blood as the last in the early morning sequence, starting with Manzi at 1:30 AM upon returning to the ERR. He had a supply of 5cc syringes to aspirate and 3cc syringes to obtain the blood sample which he carried in his pockets in plastic containers.

His description of his procedure as to Manzi is -- opened the upper port and took the tip off the 5cc syringe; put the syringe in the stopcock; opened the lever on the patient's side of the line to pass up fluid; closed the container (high pressure bag) side; drew on the syringe and saw if fluid and blood came up; stopped fluid at stopcock when a "little" fluid and blood behind it appeared in the syringe; withdrew aspirated fluid and blood in the 5cc syringe and put the syringe on top of sterile gauze; took 3cc syringe from patient's table, opened port and drew a little more than one-half cc of blood from the patient; closed port and took 3cc syringe out and put it on top of sterile gauze; used 5cc syringe containing "some" blood and fluid to again insert it in the port; closed patient's side, opened bag side; pressed button up the line to let fluid (glucose, heparin, saline) clean by going down the line under pressure; now

cleaned closed port by opening syringe and drawing in fluid over the port, a vacuum having thereby been created in the tube so all the fluid in the tip of the port dried up and the tip was cleaned; opened whole line to flush final; put back stopcock; threw the larger syringe in a container for disposables and took the smaller with the blood sample to the laboratory "maybe" at 1:40 AM.

Young's testimony is that he then went on to draw an arterial blood sample from James using new 5cc and 3cc syringes and the
same technique. This sample he took to the lab three to five minutes after taking Manzi's sample to the lab -- there was no ice to hold the samples against deterioration. Maresca was next and the same procedure was followed, each time disposing of the 5cc syringe in a container. Wellington was last. Here Muir asked him for a drop of Wellington's blood

for a chemical test and Young mistakenly handed her the 5cc syringe instead of the 3cc, both syringes being in his hands. According to Young, he had not been able to dispose of the 5cc syringe because Wellington's bed blocked the way to the disposal container in his room. He "squeezed out~ a drop of blood for the test from the 3cc syringe and disposed of the 5cc syringe in the container at the nurses station opposite Wellington's rvom. In connection with the sample Nelson remarked, according to Young, that the test could be run from the fluid and blood in the larger syringe as well as from the sample in the smaller syringe. Muir agreed but said she preferred to use the pure blood sample.

Young then took Wellington's sample to the lab at "around 2 AM" each sample having been taken to the lab at three to five minute intervals. He testified that the log book maintained by the lab which he checked, reflected the order in which he

brought the samples -- Manzi, James, Maresca and Wellington.

The next round involving the drawing of arterial blood samples in the ERR took place, Young testified, at 6:40 AM where he drew a sample from Maresca first since patients Manzi and James' beds were surrounded by curtains, they being in the processof being cleaned. He employed the same technique, using new 5cc and 3cc syringes and disposed of the 5cc syringe in the container at the nurses station. He then drew Wellington's sample and disposed of the 5cc syringe in the container at Wellington's bed. James was next -- same method, new syringes and disposal. According to Young, at this point there was no discussion with the nurses.

At about 7;20 AM, he went to Manzi, rushing the procedure because he had to give a report to the incoming staff due at 7:30 AM. Nelson was working at Manzi's bed and she called for Muir to help her. Young

testified further that he proceeded to aspirate with a 5cc syringe, obtained some fluid and blood, but the fluid went back up the line as he applied pressure from the upper button to flush the port, believing mistakenly that he had already obtained a sample in the 3cc syringe. Discovering his error in not having replaced the larger with the smaller syringe, he used the same Scc syringe to start the procedure over again, including his port cleaning method. Nelson said to him -- "You are using the same syringe." Young did not reply __ "I did not have a good impression regarding these two." When he returned from the lab, Muir was at Manzi's bed and asked him __ "Did you use a dirty syringe?" Young did not answer her __ "If I remember correctly." When "they" again asked the question -- "I said I did not use a dirty syringe, there was no contamination." "They" asked -- "How about a patient with Aids?" to which he replied -"The way I

clean up, contamination is very slim.Still later that morning at about 8 AM, Nelson said to Young -- "You used a dirty syringe," to which he replied -- "Have you ever seen me use a dirty syringe before?" Nelson replied -- "No." Young retorted -- "That's enough."

The Contentions

In general, the State argues that the testimony of Nelson and Muir establish that on the occasions in question one or the other Nurse or both saw Young use the same syringe to aspirate blood and fluid from patient Maresca to patient James on the first go round and the syringe of James to Manzi on the second go round. Pointing to certain elements of Young's testimony as being inconsistent or incredible on its face, the State would conclude that, by using the same syringe from one patient to another, Young violated the applicable procedure in which he had trained at the Hospital and for which he holds the

requisite standing. Hence the State would have the Arbitrator uphold the charge-s. F~rther, the State would have the Arbitrator affirm that there was probable cause for Young's suspension, asserting that the Hospital acted on reports and evaluations from staff representatives indicating that Young had repeatedly used an infection inducing method in drawing blood gases despite being warned initially by the Nurses on duty to refrain from such use, thus presenting a potential danger to the health of patients by his continued employment. In terms of the ultimate penalty, the State argues that termination is the only appropriate penalty in light of the State's obligation constitutionally and statutorily to provide patients with "adequate and appropriate medical care. n In the State's view there are no mitigating factors -- the grievant "has evidenced no understanding that this /the reuse of

syringes/ or any other action of his was wrong."

In general, UUP argues on behalf of the grievant, that the State had no probable cause to suspend Young because, under the Agreement (Section 19.7), it had the option of reassigning him and nits failure to do so without explanation requires the Arbitrator to vitiate Mr. Young's suspension." As to the specifications of the charges, UUP maintains that Young is innocent. The first specification concerning the events from about 1:30 AM on, it is argued, does not reflect the order in which they occurred which is said to be reflected in the log book -- "first Manzi's and then James' blood. . . . " Further, that Young brought the samples to the lab one by one rather than in a batch because he testified that on the night of February 13, the ice machine was broken. Further, that the State failed to produce the lab technician and relied instead on the testimony of the Assistant Supervisor, who testified generally

as to the lab procedures and without producing the manual. Further, that the only written report of incident does not refer "in any way to the first specification of the charge." Further, that Berenice Feldman, a supervising nurse, testified that only one incident was reported to her, allegedly occurring at 6:30 AM. Further, that Young testified that in the presence of Goldwasser and Lissauer, he was not questioned about an incident taking place at 1:30 or 2 AM. The argument concludes on this score by the assertion that "it is most probable that the incident set forth in Specification 1 never occurred." Nelson and Muir mistook what they saw as "Mr. Young has maintained. . ."

With regard to specification 2 pertaining to the events of 6:30 AM on, the argument is made that the nurses were mistaken in what they saw, their testimony was "conclusions." In reality Young's testimony should be credited that he did not use a previous patient's syringe but rather a technique of

using the same syringe on the same patient a second time as a "vacuum cleaner" to clean out the port for which he was not charged.

The argument continues to the effect that, assuming Young is guilty of the charges, the penalty "should be no more than a reprimand." The reasons given are that there was no Hospital standard for drawing arterial blood samples; if there was such, the staff respiratory therapists had no knowledge of its existence and, "per force," were never trained in its use; Young was never given any standard training at the Hospital in this- regard and, in fact, instructed other therapists "in what he considered to be the appropriate procedure based on his own experience;" if there was a standard procedure and if there was a breach, Dr. Kane "dramatically illustrated the extremely small possibility of danger to patients of a violation of such procedures as is charged. . .;" and the penalty "should be minimal" in light of Young's favorable evaluations, discretionary pay increases and

recommendations from physicians at the Hospital.

Discussion and Conclusions

The Arbitrator proceeds to an analysis of the testimony in the light of the credibility of the testimony of Nelson and Muir as compared with that of Younq as well as the testimony of additional witnesses not heretofore adverted to. Central to the inquiry is the proposition advanced by the defense to the effect that the nurses were mistaken both as to the succession of patients on the first go round and the optical illusion that they suffered from on both go rounds -- not being able to distinguish the "vacuum cleaner~ method of Young employing the same large syringe to clean up the stopcock port on the arterial line, from a ' repeated use of a previous patient's aspirated syringe to aspirate on the succeeding patient's line.

1. Initially Young testified that he had checked the lab log and it showed the

order of his drawing blood samples which he asserted he brought in separately.* But the pages of the log as to the four patients show a listing of samples by patient names not the order of drawing samples. As testified by Bennett Richardson, Assistant Supervisor, Clinical Chemistry Laboratory, and as evidenced by the marking on the log by the lab technician, the downward line effectdrawn past the names in place of individual time notations, indicates receipt of the samples as a batch at the same time, i.e., 1:42 and 6:58 AM, respectively. When confronted with the pages from the'log, Young's testimony shifted to the effect

*UUP errs in its brief by referring to Young's testimony on the first go round as from "James first and then Manzi.~ Young's testimony in this connection commences with Manzi.

that the time of processing the samples by the lab entered on the pages showed the order of his separate deliveries. In

this regard, Richardson testified that samples brought in a batch are processed in the order selected by the lab technician from out of the batch.*

Young's reference to the lack of ice on February 8 as a would be factor in bringing in the samples one by one is the subject of equivocation on his part. He gave as reason both that the ice machine was "broken" and "closed." Furthermore, Richardson testified that ice is applied in the lab by either the Respiratory Therapist or the lab technician whereas Young would have the ice applied in the E~R had it been available. The Arbitrator notes that icing is not listed in the official procedure as a responsibility of the Respiratory Therapist from which the reasonable inference is that icing, to the extent needed, is a function to be performed in the lab.

* The absence of the lab technician as a witness is no ground for a negative inference. Richardson testified as to the course of procedure regularly conducted by the lab in relation to the-Respiratory Therapist. The critical part of his testimony, i.e., delivery of the blood samples in a batch, is borne out by the markings on the log pages quite apart from any testimony the lab assistant may have given. Besides UUP was free to call the lab technician.

The testimony of Bernice Feldman, Associate Director of Nursing, relative to one incident affecting two patients as reported to her by Nelson and Muir, may be explained by the testimony of the two nurses that this incident, occurring later in the early morning, was the one witnessed by both together. The incident report of Night Supervisor M. Drislane refers to an incident occurring at 6:34 AM. It also reads, Young -- nwas observed to be using same syringes to withdraw heparinized blood from arterial line on several patients. nSeveral is more than two. In any event, whether or not an earlier incident occurred is to be determined on all the relevant and credible evidence.

There is another and significant factor for not crediting Young's testimony as to order and time of taking blood samples. It was urgent, Young testified, that he prepare a report for the incoming staff at 7:30 AM; he got to Manzi on the second go round at 7:20 AM. That time later

in his testimony became 7:30 AM as he looked at the clock in the midst of his error in forgetting to draw the 3cc syringe. Interestingly enough, however, the lab log show Manzi's sample as coming in at 6:58 AM along with the other samples and the lab processing completed as to Manzi at 7:24 AM, thus undermining further Young's testimony that he took each sample to the lab as he drew them and that the lab's processing, if not the order of receipt, would show as much.

2. Young's second go round sequence from James to Man7i is, to that extent, consistent with that testified to by Muir. However, there are departures in the first go round sequence especially telling in the order as to patient Wellington, placed last by Young and first by Nelson and Muir. Nelson and Muir testified that Young went to Wellington first to draw an arterial blood sample after he entered the ERR. Admittedly Younq made a mistake by handing

Muir the large syringe when she asked for a blood specimen for a test. Nelson was only an onlooker. It strains credibility to the breaking point for Young to testify, as he did, that Nelson nevertheless would venture the opinion that the large syringe with fluid and blood would serve the-purpose as well as a pure blood sample and for Muir to then say that she agreed but preferred the blood from the 3cc syringe. The testimony of Muir is unmistakable as to which syringe she wanted blood from and that she unreservedly rejected the proferred large syringe.

The disposal site also presents inconsistencies in Young's testimony. If the bed in Wellington's room blocked access to the container so that he had to dispose of the large syringe at the nurses station, as Young testified, he managed to use that same container on the second go round as he also testified. Indeed, his own diagram of Wellington's room shows Wellington's

disposal container at a point against the far wall apart from and not blocked by the bed. The distance between the bed and the nurses station is markedly more than that to the container in the room. Muir testified that she told Young not to take the large syringe out of the room but to discard it. She did not see him do so. Nelson followed the exchange between Muir and Young regarding Muir's request for a blood specimen. She saw him continue on with the large syringe in his possession, containing Wellington's aspirated blood.

As for the claimed concern of Young as to the stat-us of Wellington in relation to a blood and fluid precaution, it is not at all clear why a patient recovering from cardiac surgery is any the less amenable to testing for the level of blood gases. Rather than wait for an answer from the nurses, Young had only to examine the log as to the activity of the previous Respiratory Therapist which shows that a

blood gas sample had been taken from Wellington earlier. A precaution, even if it existed,* is not a cause for

* Dr Wolf testified that to his recollection none of the four patients were under a precaution.

delay until assured otherwise. It means just that -- take precaution.

The Arbitrator does not accept Young's version of the order of succession on the go rounds or that he disposed of the large syringe used on Wellington at the nurses station. Rather does he find that Young retained possession.

3. The testimony of Muir and Nelson on the two go rounds as to Young's movements to the extent that each was an eye witness is consistent within itself and in relation to one another. Both Nurses testified in a forthright manner. Neither attempted to

embellish or to exaggerate. Muir indicated in a precise manner what she did and did not see. She saw Young on the first sequence go to Maresca's bed after Wellington, could not see his hands and did not know if he took Wellington's syringe with him. Nor could she see James until after Nelson, who could see James' bed, told her -- "He's using the same syringe~ -- whereupon she moved to James' bed. There she saw a "big syringe" in James' line containing more aspirate than for a start up, ~pulled way back, nabout three-quarters or 9cc's full in what she believed to be the usual 12cc syringe. Where the fluid came from she did not know.

Nelson's testimony is in agreement with Muir as to the identity of the patient sequence on the first go round. It is also in line with Muir's description of the amount of excessive aspirate in the syringe used by Young on James. It also jibes with Muir's statement as to Nelson's exclamation

relative to Young's action, i.e., he "was using one syringe from one patient to the other." It was Nelson who testified to having actually viewed the use of the same large syringe in Young's possession after Wellington to aspirate on and from Maresca and then to aspirate again on James. The Arbitrator notes that it was not merely the drawing of blood and fluid that is mentioned in Nelson's testimony but also the taking of the same syringe from patient to patient. If the former view resulted from mistaking a second use for the "vacuum cleaner" technlque peculiar to Young, the physical act of carrying over the same syringe certainly could not have been a mere optical illusion. Even if all that was seen by Nelson and Muir was a chimera both-nurses together resolved to observe Young's actions in drawing arterial blood gas samples on the next go round so as to learn if seeing is believing.

Muir testified that before going to Manzi's bedside, she observed Young take a syringe from his hand, not having taken a syringe out of his pocket as he went there from Maresca, and proceed to aspirate on James' line. She readily acknowledged that she did not know where the syringe he actually used came from. But she testified without equivocation that the syringe he used had about Scc's of aspirate in it before he inserted it in James' line, that she objected to its use, "grabbed~ it away from Young and gave him a new syringe.

It is Nelson's testimony that at Manzi's bedside, Young entered with a large syringe containing "bloody fluid" and an empty small syringe. He placed the large syringe on the respirator top, removed the stopcock on the line and proceeded to aspirate with the large syringe. Muir substantially corroborated Nelson as to the same occurrence. Both nurses objected to Young's procedure.

4. Just as the Nurses expressed amazement to one another upon Nelson's communication to Muir of what she had witnessed on Young's early go round, so too did they testify that they, Muir in particular, communicated to Young their concerns relative to his aspiration procedures in the words as referred to in the recital of the overall testimony heretofore set forth. Young answered, in their testimony, with replies like "pulled way back. . . aspirating, not injecting. . .I have been doing it right along.

Young, on the other hand, testified that he had no "discussion" with the nurses -- they did not question his procedure until 7:20 AM at Manzi, a time indicated by the Arbitrator as erroneous. He did not answer __ "I did not have a good impression regarding these two." Still later when he allegedly returned from the lab, Muir asked __ nDid you use a dirty syringe?" Young did not answer her __ nIf I remember correctly.

nUpon being pressed for an answer, he denied using a dirty syringe __ "there was no contamination." Asked about a patient with Aids, he replied -- "The way I clean up, contamination is very slim. "Still later at 8 AM that morning, according to Young, Nelson said to him -- "You used a dirty syringe," and he replied -- "Have you ever seen me use a dirty syringe before?" Nelson answered -- "No." Young retorted -- "That's enough."

The Arbitrator credits the Nurses' account of their objections to Young and his replies as they testified. It is not at all credible that they would wait until Young returned to the lab to voice concern about his actions in aspirating at Manzi's bedside or that Muir did not object on the two occasions at James' bedside, objections manifestly consistent with and fitting their versions of what they had seen. Nor would they string out their objections, the last according to Young, coming as late as

8 AM, well after both had given their accounts to supervision.

4. In testifying that he employed the same large syringe twice, Young indicated that it was 5cc's in capacity. He did not, however, provide enlightenment as to the amount of fluid and blood he drew to start up the flow from the patient's arterial line. He spoke only of a "little" and ~some." The standard procedure, as heretofore set forth, calls for drawing 5cc's in a 10cc syringe. The kit in evidence supplied a 12cc syringe. Dr. Wolf testified that less than 4cc's would not provide an adequate start up which should run from 4 to 7cc's. Nurse Muir, who is trained in drawing blood gas samples, referred to the use of either a 10cc or a 12cc syringe -- "usually 12cc's." The amount of aspirate they testifed they saw in Young's syringe would indicate a 10 or 12cc syringe. David Lymus, Respiratory Therapist at the Hospital, called by UUP,

testified that he used a 5cc syringe, qualifying his answer, however, with "if available." If Young used a 5cc syringe not only to initially aspirate but to reinsert with aspirate and draw back so as to create a vacuum ahead as a way of cleaning the tip of the stopcock port while flushing the line, it does not appear that there would be sufficient space left at the head of the syringe to aid in generating a vacuum. The Arbitrator does not accept Young's claimed use of a 5cc syringe.

5. Young described his "vacuum cleaner"* as efficient and time saving in assuring the removal of contaminants, bacteria and virus. However, Dr. Wolf testified that the saline solution which passes over the port though removing particulates, has no effect on microorganisms. Obviously the "vacuum cleaner" of Young would not have any such effect. Rather, by not disposing of the large syringe after aspirating as mandated by the prescribed procedure and indubitably

underscored in the testimony of Drs. Wolf and Kane and, instead, as Young testified, placing the syringe on sterile gauze pending reuse in his claimed technique, would serve only to expose the tip of the syringe to air borne microbes.' Certainly this is not the efficient method of cleaning the stopcock port. Nor would the introduction of a third step by reuse of the large syringe, provide a time saving.

6. Young testified that he learned the process of drawing blood gas samples at Bellevue which was similar to that of the Hospital but that he alone devised the "vacuum cleaner." He testified further that he did not receive training at the Hospital other than on the job and that he underwent only annual CPR review to keep up his certification. He also testified that he was assigned

* This shorthand term is taken from UUP's brief.

to and did train four Respiratory Therapists of whom two, including Lymus, were trained by him in his "vacuuming" method. With regard to the document describing the procedure for drawing arterial blood gas samples, he asserted he never saw it before February 8 though he "believed" he saw the Procedure Manual.

If Young did not see the ABG procedure, it was there for him to see in the Manual kept in the Department Office. In any case, there is no variance for reuse allowed as to the requirement for the disposal of the syringe containing aspirated blood. Young underwent more than a CPR review. The record shows by way of exhibit titled "Evidence of Current Competence," signed by Technical Director David Lissauer, that Young was reviewed as to competency in April 1986. The method of review "through observation" is stated as __ "Individual is required to undergo

annual C.P.R. proficiency and A.B.G. analysis through the Technical and Medical Directors." After "What procedures has individual, through observation, been deemed competent to perform," there appears --" . . .arterial line and puncture for arterial blood gases and 02 administration. nLymus testified albeit with the prefatory "I think," that he was shown how to draw blood gases at the Hospital bedside. Furthermore, Lymus gave no sign through questioning or otherwise in his testimony, that he had received training from Young in the "vacuum cleaner" method. His testimony was that he cleaned by flushing the line of remaining blood and ~sed an alcohol swab to wipe the ports.

7. Young's testimony that he mistakenly failed to take Manzi's blood sample in the small syringe, did not notice his error apparently until he misapplied his "vacuum cleaner," and then had to reinsert the aspirated large syringe and

start over again, does not ring true. It is difficult to conceive of an experienced Respiratory Therapist such as Young forgetting to obtain a blood sample.* All the more so in that later in his testimony he added to the fault in having been dlstracted by looking at the clock which showed 7:30 AM. As previously found by the Arbitrator, the lab log shows 6:58 AM** as the arrival time of all the samples and 7:24 AM as the completion of the processing of Manzi's blood.

8. Feldman testified that it was 7:10 or 7:20 AM that same morning when she spoke with Young after Nelson and Muir reported a 6:30 AM incident to her which she thought concerned James and Manzi. She asked Young if he had used the same syringe on two patients. His reply was -- "Yes, I thought I changed the two syringes." She replied that this was a break in sterile technique." Young then said __ "I only withdraw to get a specimen. . .I was only

drawing back on the syringe." Young did not testify with respect to his statements to Feldman. At a conference with Lissauer that morning, according to Young, he told Lissauer -- ~It was not clear to others what I did."

* Yet Young volunteered the information that he had also ~skipped over" **drawing the 3cc sample on another patient,** this one unidentified.

** Moreover, in addition to the use of a vertical arrow by the lab technician to show 6:58 AM as the arrival of the batch of samples, there is 6:58 written in alonqside Manzi and Wellington as well as the continued arrow between Wellington and Manzi.

Given the importance Young attached in this proceeding to his "vacuum cleaner" technique as having been wrongly perceived by the Nurses, his expressions to Feldman and to Lissauer regarding his method, as well as those voiced to the Nurses as stated by them, are hardly descriptive of what he considered to be a unique procedure. The reasonable expectation, particularly under the circumstances of

being in the presence of supervision, would call for elaboration of his professed departure from the standard procedure of no second use of the syringe utilized to start up the flow of blood. It would also call for an explanation of his professed error with regard to skipping over the 3cc sample of Manzi's blood which was not even alluded to by Young in the conferences so far as the record discloses. Young's reply to Feldman -- "Yes, I thought I changed the two syringes," stands as an admission of a break in sterile safeguards as to James and Manzi.

9. Nelson had observed Young draw blood gas samples for two years. Muir was trained in the drawing of arterial blood samples which Nurses also perform at the Hospital. Young testified that he had employed his "vacuum cleaner" over the years. If that be the case, it defies credibility not to believe that some Nurse

at sometime would not have similarly mistaken Young's unique method and reported her observation, she too suffering from an optical illusion.

The use of the "vacuum cleaner" method by Young is not an element of the charge, the gravamen of which lies in utilizing the same syringe with aspirate from the named patient to the named patient on two occasions on February 8. Admittedly, he reinserted a large syringe with aspirate on the same patient's arterial line. The Arbitrator does not, however, accept his ~vacuum cleaner~ defense that in so doing, he reinserted the same syringe. In view of the foregoing considerations, including those negating Young's credibility, the Arbitrator finds credible the testimony of Nelson that on the early go round she saw Young take Wellington's large syringe containing aspirated contents and employ that syringe successively in drawing blood gas samples from the arterial lines of patients Maresca

and James as well as that of Muir that she saw Young go from Wellington to Maresca and then to James where she saw an amount of aspirate in the large syringe which was more than the start for one patient. On the second go round Muir testified credibly that she saw Young aspirating on James' line with a syringe already containing blood and fluid and that Young went to Manzi from James, a particular succession in which Young concurs. Nelson testified credibly that Young entered to go to Manzi's bedside with a syringe already containing bloody fluid which he placed on the respirator top, removed the entry to the stopcock port and proceeded to aspirate with that same syringe. Muir testified to the same effect as to what she saw at Manzi's bedside.*

* Muir indicated that she ~grabbedn Young's ~big~ syringe **with** already aspirated blood that he was using to draw on James' line and gave him a new syringe. Clearly, that Young placed a "big" syringe with aspirate in it on the respirator top after he

entered with Muir behind him, is established by the testimony of both Nurses. The Arbitrator makes the reasonable inference, under all the circumstances, that the syringe with aspirate brought by Young to Manzi was the syringe given him by Muir which he used to aspirate on James' line a second time having been interrupted by Muir on the first attempt. Furthermore, as heretofore found, Young admitted to Feldman relative to the 6:30 AM incident involving James and Manzi that he had used the same **syringe on** two patients, saying nothing .about a mistake on Manzi s 11ne.

Both Karenfil and Dr. Wolf testified that the use of the same syringe on more than one patient constitutes a break in the basic technique for infection control in that blood again enters the patient's line and stopcock port with the potential of exposing the patient to the **transfer of bacteria and virus.** ~echnical articles on **the danger of transmission of infection and the** potential of this occurring in analogous parenteral procedures were introduced in evidence by the State and testified to by Drs. Wolf and Kane. They differed on the inferences they drew from the articles regarding the probability of

transmission on reuse of the same syringe. They agreed, however, as the Arbitrator has noted, that reuse of the same syringe from patient to patient is not permissible. Whatever the probabilities of transmission of infection, breach of aseptic technique in the fashion found herein must per force be regarded as a serious matter warranting the conclusion that, in so doing, Young, as a Respiratory Therapist, committed a violation of mandated Hospital procedure. Accordingly, on a preponderance of the credible evidence, the Arbitrator concludes that Young is guilty of the specifications and charge as there stated, i.e., in regard to the succession therein of drawing blood and fluid from Maresca and using the same syringe to draw blood and fluid from James early on February 8, 1988 and drawing blood and fluid from James and using the same syringe to draw blood and fluid from Manzi later that morning. Probable -Cause

Dr. Wolf, in his capacity as Chairman of the Quality Assurance Committees, which Committees also considered and approved, the recommendation of Lissauer that Young be suspended and his termination sought. Preliminarily, there was the incident report of Drislane reflecting "Reported by nursing staff. . . n-the opinion of Karenfil of a breach of sterile technique, the interview by Feldman, and the interview by Lissauer. In view of the information at its disposal and the danger of nosocomial infection indicated thereby arising out of Young's violation of an indispensable step in the procedure for drawing arterial blood gases, the Arbitrator finds that the Hospital had "probable cause~ to determine that Young's "continued presence on the job represents a potential danger to persons /patients/ . . .~ (19.7 a.l.) UUP's contention that the Hospital failed to temporarily reassign Young to a position

not involving direct patient care as an alternative to suspension, is misplaced.

Section 19.7 a.1. provides in pertinent part --

> a. . . . As an alternative to such suspension, the employee may be temporarily reassigned.
>
> 1. The appointing authority, or its designee may suspend, without pay or temporarily reassign an employee, when the appointing authority, or its designee, determines that there is probable cause that such employee's continued presence on the job represents a potential danger to **persons or property or would seriously interfere with its**

> operations. Such determination shall be reviewable by the disciplinary arbitrator. . . . (Underscoring supplied.)

A reading of the foregoing clearly establishes that the Hospital possessed the authority, upon a determination of the existence of probable cause, to then either suspend or temporarily reassign Young. It is only the determination of probable cause se, i.e., "Such determination," which is reviewable by the Arbitrator. The alternative courses of action were for the Hospital to decide in its unreviewable discretion save that the Arbitrator may consider a temporary reassignment in assessing penalty if, in fact, the Hospital had elected to temporarily reassign rather than suspend.*

The Penalty

By inserting an already used large syringe containing the bloody fluid of a

patient in the course of drawing a blood sample from the arterial line of another patient, Young exposed the succeeding patient to the transmission of infectious bacteria and virus thus jeopardizing the health of patients already in grave medical condition. He continued his initial breach of unalterable sterile procedure despite the protests of an observing Nurse. The obligation of the Hospital is to maintain optimum conditions of sterility in the course of fulfilling its obligation to assure the well being of patients in its care. This responsibility devolves upon staff members such as Young who must be held to strict

* The Arbitrator's construction of 19.7 a.1. is reenforced by 19.4 h -- " The disciplinary arbitrator's decision with respect to guilt or innocence, penalty, or probable cause for suspension, or **temporary assignment, pursuant to Section 19.7**. . . shall be final and binding upon the parties, and the disciplinary

> arbitrator may approve, disapprove or take any other appropriate action warranted under the circumstances, including ordering reinstatement and back pay for all or part of the period of **suspension, or return to his or her assignment if** temporarily reassigned. If the disciplinary arbitrator, upon review, finds probable cause for the suspension, the arbitrator may consider such suspension in determining the penalty to be imposed. (Underscoring supplied.)

observance of prescribed procedures. The offenses committed call for far more than a reprimand as urged by UUP and, in the Arbitrator's judgment, less than the ultimate penalty of termination sought by the State.

Grievous as the conduct of Young was, the infractions of February 8 constituted a first time offense. His previous eight year record of employment at the Hospital does not disclose other examples of violations of professional performance relating to his work intrinsically and technically considered. There are favorable indications.

After receiving "summary performance appraisals~ of satisfactory for the period November 7, 1980 through November 7, 1985, and individual category ratings ranging from

good to excellent and outstanding, Young was appointed to permanent status as a Technical Specialist at the Hospital, effective April 18, 1986. In support of his application for permanent appointment were letters from three physicians who were familiar with Young and his work at the Hospital. In recognition of his outstanding work, he was granted discretionary salary increases in the years 1981, 1982, 1983, 1985 and 1987. Young has also been given the responsibility of training a number of respiratory therapists at the Hospital.

The Arbitrator considers that a penalty commensurate with the gravity of the wrongdoings* without, however maiming Young

* In its brief, the State cites language from an arbitrator's opinion -- 'lack of an unfortunate result occurring does not minimize the offense.' The State then comments as to this proceeding -- "In this case we might add lack of a 'known' unfortunate result. All we know is that most of the patients died. nThe record is

barren of any reference to the survival or non-survival of the patients herein let alone linkage by innuendo to the failures of Young.

permanently as a Respiratory Therapist such as might very well be a likely consequence of termination, constitutes the appropriate measure. Such penalty, including a warning, shall be a suspension without pay for eight weeks to be realized out of the suspension in effect from February 13 to the date of reinstatement.

AWARD

1. State University of New York, Health Science Center at Brooklyn, had probable cause to suspend Respiratory Therapist David Young effective February 13, 1988.

2. David Young is guilty of the charge as specified in the Notice of Discipline dated February 19, 1988.

3. The penalty of termination proposed by the State is not appropriate.

4. The penalty imposed upon David Young shall be suspension without pay for eight work weeks effective from February 13, 1988 to the termination of that eight work week period. Within a reasonable time after receipt of this Opinion and Award, State University of New York, Health Science Center at Brooklyn, shall restore David Young to his former position of Respiratory Therapist with back pay and entitlements running from the expiration of the period of suspension set forth above to the date of reinstatement.

5. In effectuating 4, above there shall be deducted from the amount of back pay, any earnings David Young may have gained through employment while under suspension, the objective being to make Young whole but not excessively whole for the period from the termination of the suspension directed in 4, above, to the date of reinstatement.

6. David Young is directed to comply with all official requests made of him in connection with 4 and 5, above.

7. David Young is warned against any further breach of professional responsibilities.

S/JONAS SILVER, ARBITRATOR

STATE OF NEW YORK) ss.:COUNTY OF NASSAU)

On this 1ST day of September 1988, before me personally came and appeared, JONAS SILVER, to me known and known to me to be the person described herein and who executed the foregoing instrument and he acknowledged to me that he executed the same.

s/Jonas Silver

Judy A. Wells
Notary Public, State of New York
No. 01-4905817
Qualified in Nassau County
Commission Expires November 2, 1989

APPENDIX I

Portions of Collective Bargaining Agreement Between State of New York and United University Professions, dated May 12, 1986

ARTICLE 19

19.1 Purpose - -

The purpose of this Article is to provide a prompt, equitable and efficient procedure for the imposition of discipline for just cause. Both parties to this Agreement recognize the importance of counseling and the principle of corrective discipline. Prior to initiating formal disciplinary action pursuant to this Article. the College President, or designee, is encouraged to resolve matters of discipline informally; provided, however, such informal action shall not be construed to be a part of the disciplinary procedure contained in this Article and shall not restrict the right of the College President, or designee, to consult with or otherwise counsel employees regarding their conduct or to initiate disciplinary action.

Definition.

a. "Discipline" shall be defined as the imposition of a penalty by means of the procedure specified in Section 19.4.

b. "Days" shall mean working days. Monday through Friday, excluding holidays.

c. "Service" shall mean the act of delivering, in accordance with provisions of this Article a notice of discipline. Service shall be effective three days from the time of personal service or, in the event of mailing, which shall be by certified or registered mail, return receipt requested, three days~ from the date the notice is returned to the College President, or designee, undelivered.

d. Party" shall mean the State and either the employee upon whom discipline is sought to be imposed or the employee's representative selected pursuant to Section 19.8 of this Article.

~ 19.3 **Applicability**

Discipline shall be imposed upon employees only pursuant to this Article; provided, however, that provisions of **this Anicle shall not** apply. to the termination of employees serving on temporary or probationary appointments, which may be terminated at any time in accordance with provisions of Article Xl of the Policies, and provided further that provisions of this Article shall not apply to nonrenewal of term appointments pursuant to Article XI of the Policies. terminations of employees due to mental or physical incapacity pursuant to Article XV of the Policies or termination of employees pur~uant to Article 35, **Retrenchment, of this** Agreement.

Section 19.4 Disciplinary Procedure

a. Discipline shall bc imposed only for just cause. Where the Collcce President, or dcsigncc. seeks to **impose** disciplinc, notice of such disciplinc shall be made in writing and served upon the cmploycc in person or by registered or certified mail, rcturn reccipt rcquestcd, to the employce's. address of record. The conduct for which disciplinc is bcing imposed and the penalty proposcd, shall be specified in thc notice. The notice servcd on the cmployec .shall contain a dctailed description of the alleged acts and conduct including rcference to dates, timcs and places.

b. The pcnalty proposcd may not bc implcmcntcd until the employee (1) fails to file a disciplinary grievance within 10 days of service of the notice of disciplinc, or (2) having filed a disciplinary gricvance, fails to file a timely appeal to disciplinary arbitr~tion, or (3) having appealed to disciplinary arbitration, until and to the cxtent that it is upheld by the disciplinary arbitrator, or (4) until the matter is settled.

c. The notice of discipline may be the subject of a disciplinary grievance which shall be filed with the Chancellor. or dcsignee, in person or by rcgistered certified mail, return receipt requestcd, by thc employee. or the employec's reprcscntativc, on a disciplinarv grievance form to be provided by thc State within 10 days of the date of servicc of notice of discipline. A copy of the notice of discipline must be attached to the disciplinary grievance form. The employee. or the employee's representative, shall be entitled to a meeting to present the employee's position to the Chancellor, or designee, within 10 days of the date of filing of the disciplinary gricvancc. The purpose of the meeting shall be the possible adjustment of the matter and need not involve the presentation of evidence or specifcation of particulars by either party. The meeting provided for herein may be waived by the employee, in writing, on the grievance form., only in accordance with provisions of Section 19.7(b).. If the meeting has not been waived but cannot be held within 10 working days of the date of filing of the disciplinary grievance by reason of the unavailability of the

employee, or the employee's representative, or on such other date as may be mutually agreed upon, the Cancellor, or designee, may, at the option of the Chancellor, or designee, review the disciplinary grievance on the basis of the existing record. Thc Chancellor. or designee, shall provide the cmployee. or thc cmployec's representative, with a rcsponsc in writing by registercd or certified mail, return receipt requested, or by pcrsonal .scrvicc within twcnty days of thc meeting or revicw, or within fivc days of the mccting or rcvicw if the employce has bccn suspended without pay under Section 19.7 of this Article.

d. If the disciplinary grievancc is not scttlcd or othcrwisc resolvcd, it may bc appealed to disciplinary arbitration by the emp1oycc, or thc cmployee's rcpresentativc, within 10 days of receipt ot thc response of the Chancellor, or designee. Notice of appeal to disciplinary arbitration shall be filed by registercd or certified mail, return receiipt requestcd. or by personal service upon the Director of Employee Relations, or designee. A **copy of the appeal** shall be sent simultaneously to the College President and the Chancellor's designee.

e. The State and UJUP shall jointly agree within 15 days of the execution of this Agrecment on a 25 member pancl of disciplinary arbitrators. Each member of the panel shall be assigned a number in rotation and. in the event of a disciplinary arbitration the first arbitrator in order who is available to conduct a hcaring within 10 days of appointmcnt shall servc as thc arbitrator. The Statc agrees to perrform activities necessary to appropriate admininistration of the panel including but not limited to. identifying arbitrators availability, notifying them of thcir appointment and assisting in arranging for hcaring rooms.

f. The disciplinary arbitrator shall hold a hearing within 10 days of appointment, or as sooon thereafter as practical. or within such other period as may be mutually agreed upon by the parties, recognizing, however. that except in unusual circumstances a hearing should be concluded within 30 days of the appointment of the arbitrator. The disciplinary arbitrator shall render a decision within five days of the close of the hearing, or within five days after receipt of the transcript. if either party elects a transcript, or

within such other time as may be mutually agreed upon by thc parties.

g. Either party wishing a **transcript** of a disciplinary arbitration hearing may provide for one at its expense and shall provide a copy to the arbitrator and the other party; provided, however, the decision to make a transcript must be announced at the beginning of the hearing and the transcript must cover the entire hearing, not just a portion thereof. Delays in the preparation of a transcript shall not constitute a basis for delays in scheduling hearing dates.

h. The disciplinary arbitrator shall be confined to determinations of guilt or innocence and the appropriateness of proposed penalties. The disciplinary arbitrator may consider issues of timeliness, including those arising pursuant to Section 19.9, but shall not consider alleged violations of provisions of this Agreement, which shall be .subject only to the provisions of Article 7, Grievance Procedure, of this Agreement. The disciplinary arbitrator's decision shall neither add to, subtract from nor modify the provisionsi of this Agreement. The disciplinary arbitraltor's decision with respect to guilt or innocence, penalty. or probable cause for suspension, or temporary reassignmcnt, pursuant to Section 19.7 of this Article. shall be final and binding upon thc parties and the disciplinary arbitrator may approvc, disapprove or take any other appropriate action warranted undcr the circumstances, including ordering reinstatement and back pay for all or part of the periodt of suspension, or return to hisi/her assignmcnt if temporarily reassigned. If thc disciplinary arbitrator, upon revicw, finds probablc cause for thc suspcnsion, the arbitrator may consider such .suspcnsion in determining the penalty to be imposed.

i. All fccs and expenses of thc arbitrator, if any, .shall be divided equally between the Statc and UUP or the employee if not rcpresentcd by UUP. Each party shall bear the cost of preparing and prescnting its own case. The estimated arbitrator's fee and expense~ and estimated expense of the arbitration may be collected in advance of the hearing.

19.5 Settlements

a. A disciplinary grievance may bc settled at any timc following thc service of a notice of discipline. Thc tcrms of thc scttlemcnt

shall bc rcduccd to writing on the disciplinary grievance form to be provided by the State. An employee offered such a settlement shall be offered a reasonable opportunity to have a representative present before the employee is required to execute it.

19.6 Effect of Settlement and Arbitrator's Award

a. All settlements and arbitrators' awards shall be final and binding upon the State, UUP, the employee and the employee's representative if other than UUP.

19.7 Suspension Before Notice of Discipline

a. Prior to issuing a notice of discipline or the completion of the disciplinary grievance procedure provided for in this Article, an employee may be suspended, without pay, by the appointing authorityonly pursuant to paragraphs (1) or (2) of this Section. As an alternative to such suspension, the employee may be temporarily reassigned.

1. The appointing authority, or its designee may suspend, without pay or temporarily reassign anemployee when the appointing authority, or its designee, determines that there is probable cause that such employee's continued presence on the job represents a potential danger to persons or property-or would severely interfere with its operations. Such determination shall be reviewable by the disciplinary
arbitrator. A notice of discipline shall be served no later than five days following any such suspension or temporary reassignment.

2. The appointing authority, or its deslgnee, may suspend without pay or temporarily reassign an employee charged with the commission of a crime. Such employee shall notify the appointing authority in writing of the disposition of any criminal charge including a certified copy of such disposition within five days thereof. Within 30 calendar days following such suspension under this paragraph, or within five days from receipt by of notice of disposition of the charge from the employee, whichever occurs first, a notice of discipline shall be served on such employee or the employeeshall be reinstated with back pay if suspended orreturned to his/her assignment if temporarily reassigned. Nothing in this paragraph shall limit the right of the appointing authority, or

its designee, to take disciplinary action during the pendency of criminal proceedings.

3. Where the appointing authority, or its designee, elects to temporarily reassign an employee pursuant to this Article, the employee shall be notified in writing of the location, the effective date and nature of such temporary reassignment and that the employee may elect in writing to refuse such temporary reassignment and may be suspended without pay. The employee's election must be made in writing before commencement of the temporary reassignment. Ar election by the employee to refuse such temporary
reassignment is final and may not thereafter be withdrawn. No election by the employee is permitted once the employee commences the temporary reassignment.
4 - The fact that the appointing authority, its designee, has temporarily reassigned an employee rather than suspending the employee without pay shall not be considered by the disciplinary arbitrator for any purpose.

b. Where an employee has been suspended without pay or temporarily reassigned pursuant to this article, the employee may, in writing, waive the meeting with the Chancellor, or designee, at the time of filing a disciplinary grievance. In the event of .such waiver, the employee shall file the disciplinary grievance form, within the prcscribcd timc limits for filing a grievance with the Chancellor. or dcsignee directly with the Director of Employee Relations, or designee. in accordance with the provisions of Section 19.4(d).

19.8 Rcpresention
a. An employee may represent himself/hcrsclf or be accompanied for purposes of representation by UUP or counsel at any stage of the disciplinary procedure contained in this Article; provided, howcvcr, an cmployee's rcprescntative may only act on
thc employee's. bchalf, in thc absence of thc employee upon mutual agrccmcnt of thc partics.

19.9 Limitation

An employee shall not be disciplined for acts,except those which would constitute a crime, which,occurred more than one year prior to the service of the notice of discipline. The employee's whole record of cmployment, however, may be considered with respect to the appropriateness of the penalty to be imposed, if any.

19.10 Miscellaneous Provisions

a. Mailing- 1. A11 grievances, grievance appeal; and rcsponses shall be transmitted by certificd or registered mai1, return receipt requested or by personal service on the grievant or his or her representative or on the individual responsible for conducting the review. Upon personal service the recipient of such documents. upon request. shall acknowledge, in writing,thc receipt thereof. Proof of personal service shall specify the person who was served and thc date, place and manner of service.

2. All time limits set forth in this Article shall be measured from the date of receipt. Whcrc service is by registercd or certificd mail. the date of receipt shall be that datc appearing on thc return receipt,provided however, that the time limits for the submission of a grievance or the filing of an appeal or demand for arbitration or issuance of a step response shall be determined from the date of personal service or mailing by certified or registered mail, return receipt requested, as evidenced by the official postmark appearing on the receipt for certified or registered mail.

****

Section 50.1 This Agreement shall be effective on the date it is signed by the parties, but not earlier than July 1, 1985 and shall continue through June 30, 1988 except as specified otherwise in the Agreement or by mutual agreement of the parties.